

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building  
100 Maryland Avenue  
Rockville, Maryland 20850  
(240) 777-6600

[www.montgomerycountymd.gov/content/council/boa/board.asp](http://www.montgomerycountymd.gov/content/council/boa/board.asp)

**Case No. S-2600**

**PETITION OF TZVETANKA S. AND DONTCHO V. JELEV**

OPINION OF THE Board

(Effective Date of Opinion: June 24, 2004)

Case No. S-2600 is an on the application for a special exception pursuant to Section 59-G-2.00 (Accessory Apartment) of the Zoning Ordinance to permit an existing accessory apartment. Pursuant to the provisions of Section 59-A-4.125 of the Zoning Ordinance, the Board of Appeals referred the case to the Hearing Examiner for Montgomery County to hold a public hearing and submit a report and recommendation for final action by the Board. The Hearing Examiner convened a hearing on April 23, 2004, and on May 24, 2004, issued a report and recommendation for approval of the special exception.

The subject property is Lot 6, Block 19; Bel-Pre Wood Subdivision; located at 14012 Arctic Ave, Rockville, Maryland, 20853, in the R-90 Zone.

Decision of the Board:                      Special Exception **granted** subject  
to conditions enumerated below.

The Board of Appeals considered the Hearing Examiner's report and recommendation at its Worksession on June 9, 2004. After careful consideration and review of the record, the Board adopts the report and recommendation and grants the special exception, subject to the following conditions:

1. The Petitioner is bound by her testimony and exhibits of record to the extend that such evidence and representations are identified in the opinion of the Board and in the Hearing Examiner's report and recommendation dated May 24, 2004.
2. One window in each bedroom must be enlarged to meet Code standards for emergency egress. This requires a window that can be opened without a tool and has at least five square feet in net clear opening, a minimum net clear opening height of 22 inches, and a minimum net clear opening width of 20 inches, with the bottom of the opening not more than 44 inches above the floor.
3. A partition must be installed in the kitchen to separate the heating, ventilation and cooling ("HVAC") systems from the kitchen area. The return air for the furnace must not be taken from the kitchen. In addition, a grill or vent must be installed in the partition for adequate air intake for the HVAC systems.

4. A kitchen stove must be installed. An electrical work permit must be obtained and finalized.
5. A single-cylinder deadbolt lock (key-operated from the outside, thumb-turn on the inside) must be installed on the apartment entrance door.
6. The concrete retaining wall adjacent to the apartment entrance door must be repaired in a proper and good, workmanlike manner.
7. The walkway leading to the accessory apartment must be repaired in a proper and good, workmanlike manner to be certain it is in good, safe, serviceable condition and prevents any tripping hazard.
8. The rear and side yard must be properly landscaped to prevent erosion and washout. An effective ground cover (sod) must be installed.
9. The accessory apartment may be inhabited by no more than two unrelated persons or a family of six persons.

On a motion by Donna L. Barron, seconded by Allison Ishihara Fultz, with Angelo M. Caputo, Donald H. Spence, Jr., Chairman in agreement and Louise L. Mayer necessarily absent, the Board adopted the following Resolution:

**BE IT RESOLVED** by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

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Donald H. Spence, Jr.  
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 24<sup>th</sup> day of June, 2004.

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Katherine Freeman  
Executive Secretary to the Board

**NOTE:**

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.

See Section 59-A-4.53 of the Zoning Ordinance regarding the twenty-four months' period within which the special exception granted by the Board must be exercised.

BEFORE THE MONTGOMERY COUNTY  
BOARD OF APPEALS

Office of Zoning and Administrative Hearings  
Stella B. Werner Council Office Building  
Rockville, Maryland 20850  
(240) 777-6660

IN THE MATTER OF: DONTCHO JELEV  
AND TSVETANU JELEVA,  
Petitioners

For the Petition

Barbara Foresti, Department of Housing  
and Community Affairs  
Kevin Martell, Housing Code Inspector  
Department of Housing and  
Community Affairs

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Board of Appeals Case No. S-2600  
(OZAH Referral No. 04-39)

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Before: Françoise M. Carrier, Hearing Examiner

**HEARING EXAMINER'S REPORT AND RECOMMENDATION**

**I. STATEMENT OF THE CASE**

Petition No. S-2600, filed on December 19, 2003, seeks a special exception, pursuant to §59-G-2.00 of the Zoning Ordinance, to permit an accessory apartment use in a single-family residential structure located at 14012 Arctic Avenue, Rockville, Maryland 20853. The subject property is designated Lot 6, Block 19 in the Bel Pre Woods Subdivision and is zoned R-90 (Residential, one-family detached) (Tax Account No. 01389278).

By Resolution adopted January 7, 2004 and effective March 5, 2004, the Board of Appeals ("BOA") referred this matter to the Hearing Examiner to conduct a public hearing and render a written report and recommendation to the BOA. On February 3, 2004 the Board of Appeals scheduled a hearing in this matter, to be held by the hearing examiner on April 23, 2004.

Technical Staff at the Maryland-National Capital Park and Planning Commission reviewed the petition and, in a memorandum dated April 15, 2004 (Exhibit 13), recommended approval of the petition with conditions. The Department of Housing and Community Affairs ("DHCA")

inspected the property on April 14, 2004, and set forth certain requirements for the granting of the requested special exception in a memorandum of the same date (Exhibit 14).

A public hearing was convened as scheduled on April 23, 2004 at which testimony was presented in favor of the petition by the Petitioner and DHCA staff. No testimony was offered in opposition to the special exception and the record closed on the day of the hearing.

## **II. BACKGROUND**

For the convenience of the reader, background information is grouped by subject matter.

### **A. The Subject Property**

The subject property is located at 14012 Arctic Avenue, on the west side of Arctic Avenue about 100 feet south of its intersection with West Frankfort Drive. The property is rectangular, with approximately 9,834 square feet of land and a street frontage of nearly 85 feet. It is relatively flat along the street, but a small hill in the northwest corner of the backyard slopes toward the house. The property is developed with a brick-and-siding, detached single-family home that contains approximately 2,500 square feet. The house is nearly two stores above ground in the front and one story in the rear. A fenced, second-story deck extends from the south side of the house, and an open, one-foot-high deck is attached to the rear (west face) of the house. On the north side of the house, outside the entrance to the accessory apartment, is a small, concrete patio that is enclosed by low retaining walls to the east and west. A short, concrete driveway in the southeast corner of the property has two parking spaces and a concrete walkway leading to the front door. A brick walkway connects the public sidewalk along Arctic Avenue with the concrete patio and the entrance to the accessory apartment. The entrances, the second-story deck and the concrete patio are lit by what appear to be standard residential light fixtures, and Technical Staff opined that the resulting illumination is not objectionable. The front yard is landscaped with two mature shade trees and various ornamental trees and shrubs. The backyard has a stand of tall shade trees, some evergreens, shrubs and smaller plantings.

The front of the house is shown in the photographs below, on which the Petitioners have circled the exterior lights. A house location plan showing the location of the building on the site and the approximate locations of trees is reproduced on page 4.

**Photograph of Front of House, Ex. 9(a), top of page**



NOTE:  
LIGHTING  
FOR THE  
SIDE WALK  
AND THE  
ENTRANCE  
FOR THE  
BASEMENT

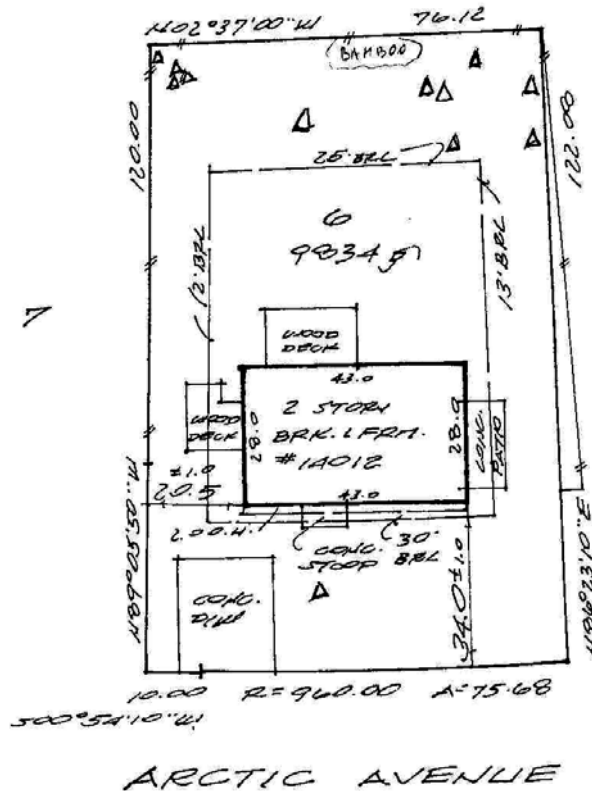
← Side  
entrance  
for the  
accessory  
apartment

**Photograph of Front of House, Ex. 9(a), bottom of page**



NOTE:  
LIGHTING  
FOR THE  
FRONT  
ENTRANCE  
AND  
TWO-CAR  
PARKING  
SPACE

## House Location Plan with Trees Marked, Ex. 6



A-tree



No evidence of property corners was found. Apparent occupation is shown.

Date: 5-21-03 Scale: 1"=30' Dm: B.P.  
 Plat Book: 74  
 Plat No.: 7292 NO TITLE REPORT FURNISHED  
 Work Order: 03-2295  
 Address: 14012 ARCTIC AVENUE  
 District: 13  
 Jurisdiction: MONTGOMERY COUNTY, MD

LOCATION DRAWING  
 LOT 6  
 BLOCK 19  
 PLAT SEVENTEEN  
 BEL-PRE WOODS

## Surveyor's Certification

I hereby certify that the survey shown hereon is correct to the best of my knowledge and that, unless noted otherwise, it has been prepared utilizing description of record. This survey is not a boundary survey and the location of existence of property corners is neither guaranteed nor implied. Fence lines if shown, are approximate in location. This property does not lie within a 100 year flood plain according to FEMA Insurance maps as interpreted by the originator unless otherwise shown hereon. Building restriction lines shown are as per available information and are subject to the interpretation of the originator.

*Stephen J. Wenthold*



Meridian Surveys, Inc.  
 811 Russell Avenue  
 Suite #303  
 Gaithersburg, MD 20879  
 (301) 721-9400

\*E: This plat is of benefit to a consumer only insofar as it is required by a lender or a title insurance company or its agent in connection with contemplated transfer, financing or refinancing. This plat is not to be relied upon for the establishment or location of fences, garages, buildings, or other existing or future improvements. This plat does not provide for the accurate identification of property boundary lines, but such identification may not be required for the transfer of title or securing financing or refinancing.

B.

### **The Neighborhood and its Character**

Technical Staff defined the general neighborhood of the subject property as the area bounded on the north by Flint Rock Road and West Frankfort Drive; on the east by Parkland Local Park; on the south by the property line between 14001 and 13907 Arctic Avenue and Vista Drive; and on the west by Congress Drive. Staff explained in a supplemental memorandum, Exhibit 15, that they consider the general neighborhood to be quite small because the impacts of the proposed use are quite minor, and the neighborhood seems readily capable of supporting an increase in population. Technical Staff felt that the only neighbors affected by this use would be those close enough to see or hear the tenants coming and going, or to be aware of other minor impacts of their residence. Staff believes that the additional occupants in the accessory apartment would be “nearly imperceptible” outside the described neighborhood.

DHCA staff described the neighborhood of the subject property more broadly than Technical Staff to the north, south and west. DHCA would designate a neighborhood extending from Arctic Avenue on the east to Flint Rock Drive on the north, Drake Drive on the west, and the continuation of Flint Rock Drive on the south. DHCA would not include, however, any confronting properties on the east side of Arctic Avenue.

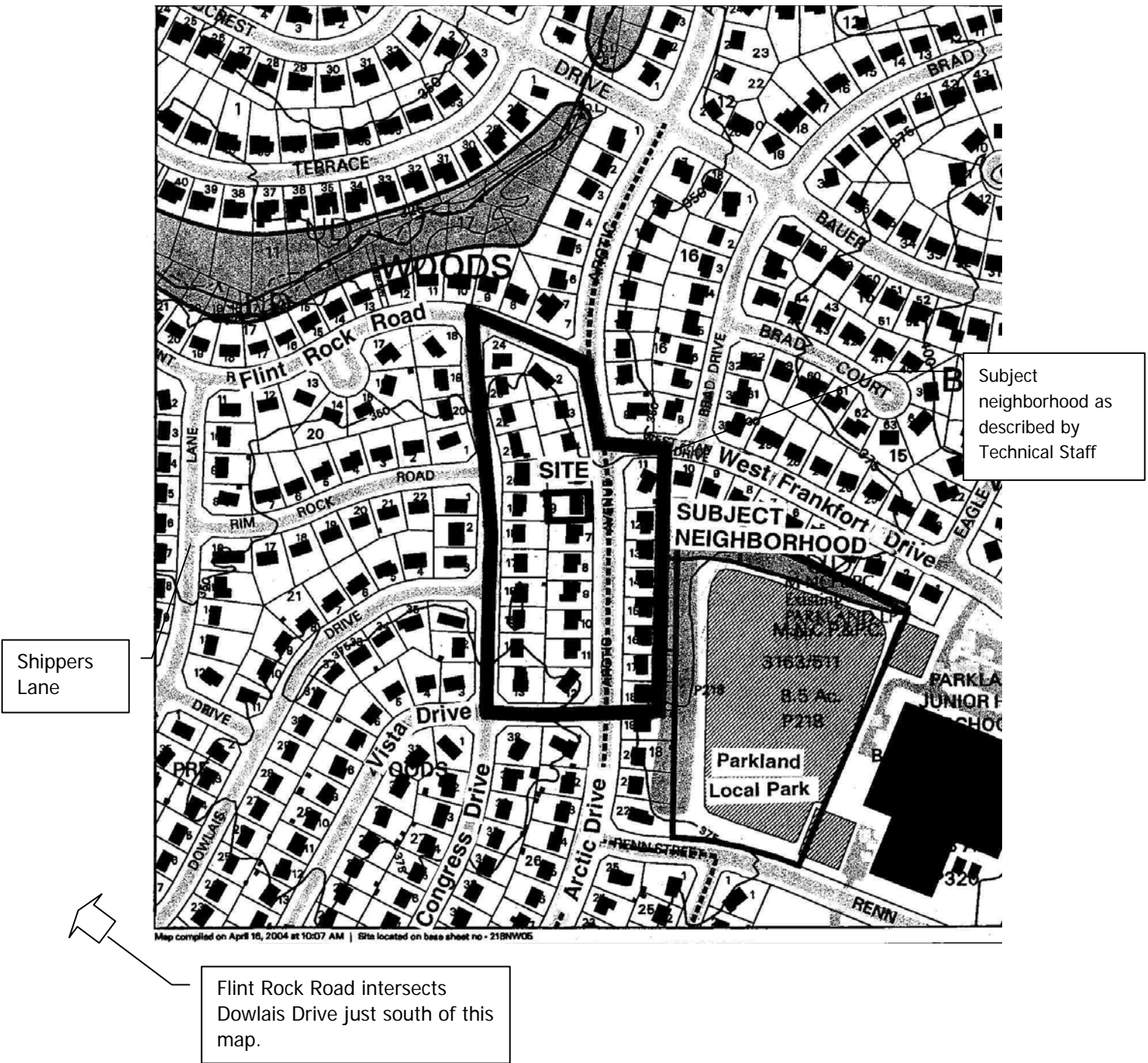
The Hearing Examiner believes that both Technical Staff’s recommendation and DHCA’s have merit. Accordingly, the Hearing Examiner describes the neighborhood to include all the area recommended by Technical Staff and most of the area recommended by DHCA: that area bounded on the east by the rear of the properties on the east side of Arctic Avenue, between Vista Drive and West Frankfort Drive, on the north by Flint Rock Road, on the west by Shippers Lane and a line extending south from its cul de sac, and on the south by the continuation of Flint Rock Road.

The neighborhood is classified entirely under the R-90 Zone, and is developed with single-family detached, medium-density housing. Just outside the neighborhood to the east are Parkland Middle School, Brookhaven Elementary School and Parkland Local Park. Arctic Avenue connects with Bel Pre Road and Aspen Hill Road to the north and south, respectively, both of which connect with Georgia Avenue not far from the subject site. Rock Creek Stream Valley Park and Rock



Creek Regional Park are a short distance west of the site. The only existing special exception in the neighborhood is one accessory apartment, about two blocks from the subject property. This apartment is outside the neighborhood that Technical Staff described. Nearly all of the neighborhood as described may be seen on the map below, excerpted from the Staff Report.

Neighborhood Map, excerpted from Staff Report, Ex. 13



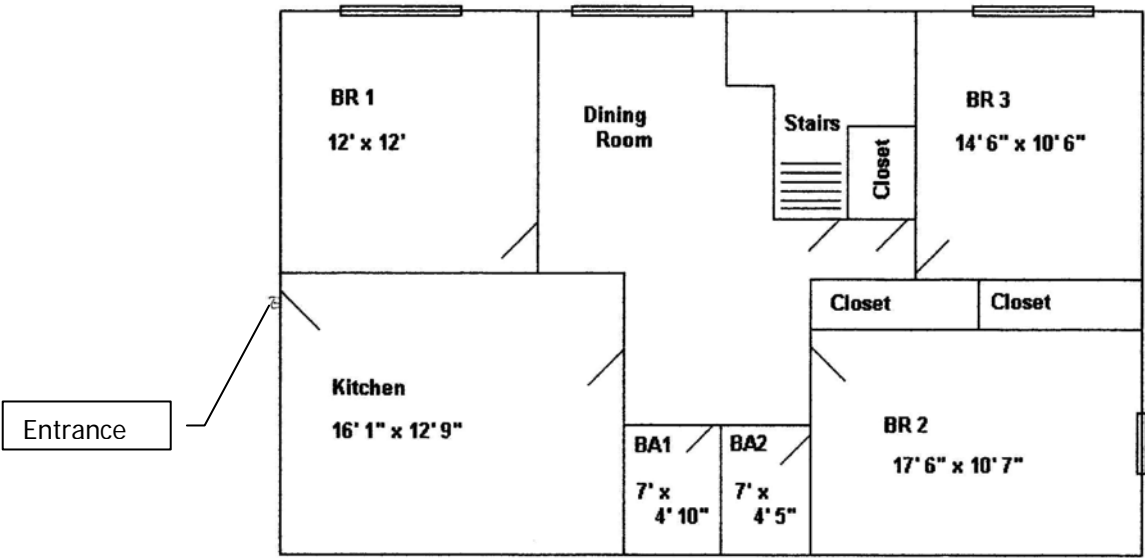
**C. Master Plan**

The property is located within the area of the *1994 Aspen Hill Master Plan* (the “Master Plan”). The Master Plan does not specifically address the subject property or accessory apartments, although one of its major objectives is increasing housing resources. The Master Plan supports the existing R-90 zoning for the property, which permits accessory apartments by special exception.

**D. Existing and Proposed Use**

The Petitioners and their son reside in the main dwelling unit on the subject property, comprised of the upper level of the house, which measures roughly 1,300 square feet. The previous owner operated the separate apartment in the lower level as a rental unit for some time, and the Petitioners would like to continue that use. When their application was filed, the Petitioners had three tenants living in the apartment. Following receipt of the DHCA inspection memorandum, which notes that no more than two unrelated persons are permitted to live in the first floor apartment, the Petitioners asked one of their tenants to leave. Testimony at the hearing indicated that the third tenant moved out during the week of the public hearing.

The first floor apartment at the subject property consists of approximately 1,040 square feet, and has three bedrooms, two bathrooms, a kitchen and a dining room. The site has two on-site parking spaces and three off-site, on the street in front of the property. A floor plan is shown below.



### III. SUMMARY OF TESTIMONY

Kevin Martell, Housing Code Inspector for DHCA, testified at the hearing that, as noted in his inspection report (Ex. 13), the first-floor apartment is subordinate to the main dwelling. The main dwelling has approximately 743.5 square feet of habitable floor area and the apartment has approximately 683 square feet of habitable floor area. Based on the square footage of the apartment, occupancy is limited to two unrelated persons or a family of six. Mr. Martell also testified that in its current condition, the apartment fails to satisfy applicable standards in a number of respects. If the special exception is granted, the Petitioners will be required to make the following improvements before DHCA will issue a license (see Ex. 14):

1. One window in each bedroom must be enlarged to meet Code standards for emergency egress. This requires a window that can be opened without a tool and has at least five square feet in net clear opening, a minimum net clear opening height of 22 inches, and a minimum net clear opening width of 20 inches with the bottom of the opening not more than 44 inches above the floor.
2. A partition must be installed in the kitchen to separate the heating, ventilation and cooling ("HVAC") systems from the kitchen area. The return air for the furnace must not be taken from the kitchen. In addition, a grill or vent must be installed in the partition for adequate air intake for the HVAC systems.
3. A kitchen stove must be installed. An electrical work permit must be obtained and finalized.
4. A single-cylinder deadbolt lock (key-operated from the outside, thumb-turn on the inside) must be installed on the apartment entrance door.
5. The concrete retaining wall adjacent to the apartment entrance door must be repaired in a proper and good, workmanlike manner.
6. The walkway leading to the accessory apartment must be repaired in a proper and good, workmanlike manner to be certain it is in good, safe, serviceable condition and prevents any tripping hazard.

7. The rear and side yard must be properly landscaped to prevent erosion and washout. An effective ground cover (sod) must be installed.

Mr. Martell explained that the Petitioners are required to make the windows conform to emergency egress standards only in rooms that they plan to use as bedrooms. If only two people live in the apartment, only two of the rooms are required to have windows with the specifications noted above. The Petitioners would be required to tell DHCA which rooms are to be used for bedrooms, so that information can be noted in the inspection report. The Hearing Examiner requested that the Mr. Martell submit a copy of the final inspection report to the BOA to include in the record, to avoid any potential confusion about which rooms are required to have emergency egress windows.

Mr. Martell noted that Technical Staff mistakenly stated in their report that the subject use had existed for many years before the Petitioners purchased the subject property in June 2003. He explained that while there was physically an apartment in existence prior to the Petitioners' acquisition of the home, it was not a legally recognized accessory apartment.

Tzvetanka S. Jeleva participated in the hearing on behalf of herself and her husband, co-applicant Dontcho Jeleu. Ms. Jeleva adopted the Staff Report as part of her evidence in this case. She confirmed that she lives in the main dwelling unit with her husband and son and plans to live there on a permanent basis. She stated that there are two tenants in the lower level apartment, and no living units other than the downstairs apartment and the main dwelling. Ms. Jeleva acknowledged that if the proposed special exception is granted, it cannot take effect until June 5, 2004, when she and her husband will have owned the property for one year. (Given the timing of the hearing and this report, the effective date would not be before that, in any event.) She testified that she and her husband have not had any complaints from neighbors about parking or anything else related to the apartment. She further testified that she understands the occupancy limits described by Mr. Martell and will adhere to them, as well as the requirement for emergency access windows in each room to be used as a bedroom.

Ms. Jeleva requested an extension of the normal three-month time period to make the necessary improvements after the granting of a special exception. She explained that she and her

husband are involved in renovations in the upstairs unit that cannot be postponed, so they would like the three months to do repairs in the apartment to begin around mid-June. Mr. Martell explained that these are life safety requirements, so extensions normally are not granted. (The Hearing Examiner notes that the Board's decision in this case is unlikely to be made until early to mid-June, in any event.) Ms. Jeleva then expressed some reluctance to change any of the windows in the lower level, for fear that it would change the façade and she would be obligated to change all of the windows. In addition, her husband recently installed concrete near one of the windows, which he would have to remove to lower the window sill. Mr. Martell explained that the façade need not be changed. The windows can be replaced with double-hung, removable sash windows, which allow an occupant to pull the whole window and sash out in the event of a fire, without any tools. The Hearing Examiner explained as carefully and clearly as possible that the items listed in Mr. Martell's report are not optional, that the Petitioners have no choice but to make all of those changes if they wish to rent out the lower level apartment. Ms. Jeleva agreed to make the changes within the three months allowed.

#### **IV. CONCLUSIONS**

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because there may be locations where it is not appropriate. The zoning statute establishes both general and specific standards for special exceptions, and the petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Based on the testimony and evidence of record, I conclude that the instant petition meets the general and specific requirements for the proposed use, with the conditions recommended at the conclusion of this report. The Petitioners have agreed to satisfy all of these conditions.

##### **A. Standard for Evaluation**

The standard for evaluation prescribed in Code § 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on

nearby properties and the general neighborhood. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.21. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with an accessory apartment. Characteristics of the proposed special exception that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed special exception that are not consistent with the characteristics thus identified, or adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects thus identified must be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff in this case identified the following as physical and operational characteristics necessarily associated with an accessory apartment: the existence of the apartment as a separate entity from the main living unit but sharing a party wall with it; the provision within the apartment of the necessary facilities, spaces and floor area to qualify as habitable space under the Building Code; a separate entrance and walkway and sufficient lighting; sufficient parking; the existence of an additional household on the site with resulting additional activity including more use of outdoor space and more pedestrian, traffic and parking activity; and the potential for additional noise. Technical Staff concluded and the Hearing Examiner agrees that the accessory apartment proposed in this case has no unusual physical or operational characteristics, nor are there any unusual site characteristics, therefore the proposed use would have no non-inherent adverse effects.

## **B. General Conditions**

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report, the DHCA inspection report, and the Petitioners' testimony and written submissions provide ample evidence that the general standards would be satisfied in this case.

### **Sec. 59-G-1.21. General conditions.**

- (a) A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:
  - (1) Is a permissible special exception in the zone.

Conclusion: An accessory apartment is a permissible special exception in the R-90 Zone.

- (2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed special exception would comply with the standards and requirements set forth for the use in Code §59-G-2.00, as detailed in Part IV.C. below.

- (3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The evidence supports Technical Staff's finding that the proposed special exception would be consistent with the objectives of the *Aspen Hill Master Plan*. The Master Plan supports the existing zoning category, which allows such uses by special exception, and one of its main objectives is increasing housing resources in Aspen Hill.

- (4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any

proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.

Conclusion: The proposed special exception would be in harmony with the general character of the neighborhood considering the cited factors. It would have little impact on population density; it would not result in any changes to the exterior of the house; it would result in a modest increase in intensity of use of the property with no change in the character of such use; it would result in only a minimal increase in vehicular traffic; the site has adequate parking both on-site and in the street in front of the house; and only one accessory apartment has been identified in the general neighborhood.

- (5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence demonstrates that due to the modest impacts of the proposed accessory apartment, the special exception would not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site.

- (6) Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: Based on the nature of the use and the typical residential exterior lighting, the special exception would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity.

- (7) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.

Conclusion: Only one special exception has been identified in the general neighborhood. The Hearing Examiner agrees with Technical Staff's conclusion that this single-



family detached neighborhood can easily and harmoniously accommodate the activity represented by the proposed special exception. (Technical Staff's conclusion was based on a smaller neighborhood, but readily transfers to the larger neighborhood the Hearing Examiner has applied.) Adding the accessory apartment proposed here would not increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely. Moreover, given that the proposed use is residential in nature, it would be very unlikely to alter the predominantly residential nature of the area.

- (8) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.

Conclusion: The Hearing Examiner accepts Technical Staff's conclusion that the proposed special exception would be adequately served by the specified public services and facilities.

- (i) If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.

Conclusion: No subdivision approval would be required. Technical Staff reports that the proposed accessory apartment would generate one additional vehicle trip during the peak hours, far below the 30-trip threshold that triggers Local Area Transportation Review. For purposes of Policy Area Transportation Review, the subject property is located within the Aspen Hill Park policy area,

which had negative housing capacity as of March 31, 2004. However, the proposed use would qualify for exemption from the Policy Area ceiling as a de minimus use.

- (ii) With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.

**Conclusion:** The evidence of record supports the finding that the proposed use would have no detrimental effect on the safety of vehicular or pedestrian traffic.

### **C. Specific Standards**

The memorandum submitted by DHCA (Ex. 14), the Staff Report (Ex. 13) and the Petitioners' testimony and written submissions provide sufficient evidence that the specific standards set forth in Section 59-G-2.00 are satisfied in this case, as described below.

#### ***Sec. 59-G-2.00. Accessory apartment.***

A special exception may be granted for an accessory apartment on the same lot as an existing one-family detached dwelling, subject to the following standards and requirements:

##### **(a) Dwelling unit requirements:**

- (1) Only one accessory apartment may be created on the same lot as an existing one-family detached dwelling.

**Conclusion:** Only one accessory apartment is proposed.

- (2) The accessory apartment must have at least one party wall in common with the main dwelling on a lot of one acre (43,560 square feet) or less. On a lot of more than one acre, an accessory apartment may be added to an existing one-family detached dwelling, or may be created through conversion of a separate accessory structure already existing on the same lot as the main dwelling on December 2, 1983. An accessory apartment may be permitted in a separate accessory structure built after December 2, 1983, provided:

- (i) The lot is 2 acres or more in size; and
- (ii) The apartment will house a care-giver found by the Board to be needed to provide assistance to an elderly, ill or handicapped relative of the owner-occupant.

**Conclusion:** The apartment is located in the first floor of the main dwelling and therefore the two units share a wall in common.

- (3) An addition or extension to a main dwelling may be approved in order to add additional floor space to accommodate an accessory apartment. All development standards of the zone apply. An addition to an accessory structure is not permitted.

Conclusion: No addition or extension of the main dwelling is proposed.

- (4) The one-family detached dwelling in which the accessory apartment is to be created or to which it is to be added must be at least 5 years old on the date of application for special exception.

Conclusion: The Petitioner estimated that the house is approximately 40 years old.

- (5) The accessory apartment must not be located on a lot:

- (i) That is occupied by a family of unrelated persons; or
- (ii) Where any of the following otherwise allowed residential uses exist: guest room for rent, boardinghouse or a registered living unit; or
- (iii) That contains any rental residential use other than an accessory dwelling in an agricultural zone.

Conclusion: The Petitioners, a married couple, occupy the main dwelling unit with their son. Two unrelated tenants occupy the accessory apartment, but not as a family.

- (6) Any separate entrance must be located so that the appearance of a single-family dwelling is preserved.

Conclusion: As noted by the Technical Staff, the single-family appearance of the dwelling is unaffected by the entrance to the accessory apartment, which has the appearance of a side door into a single-family home.

- (7) All external modifications and improvements must be compatible with the existing dwelling and surrounding properties.

Conclusion: No changes to the exterior of the building are currently planned in connection with this accessory apartment.

- (8) The accessory apartment must have the same street address (house number) as the main dwelling.

Conclusion: The accessory apartment will have the same address as the main dwelling.

- (9) The accessory apartment must be subordinate to the main dwelling. The floor area of the accessory apartment is limited to a maximum of 1,200 square feet.

Conclusion: The accessory apartment is subordinate to the main dwelling, because the upstairs main unit is larger than the first floor apartment. The main dwelling unit contains approximately 1,300 square feet of space and the apartment has roughly 1,040 square feet.

**59-G § 2.00(b) Ownership Requirements**

(1) –The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period of temporary absence may be increased by the Board upon a finding that a hardship would otherwise result.

Conclusion: The Petitioners plan to live in the main dwelling unit permanently.

(2) – Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the petitioner, one year must have elapsed between the date when the owner purchased the property (settlement date) and the date when the special exception becomes effective. The Board may waive this requirement upon a finding that a hardship would otherwise result.

Conclusion: The Petitioners purchased the property on June 5, 2003. Accordingly, they cannot be granted a special exception for an accessory apartment prior to June 5, 2004.

(3) Under no circumstances, is the owner allowed to receive compensation for the occupancy of more than one dwelling unit.

Conclusion: The Petitioners will receive compensation for only one dwelling unit.

(4) For purposes of this section owner means an individual who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the Board.

Conclusion: The Petitioners are the owners of the property.

(5) The restrictions under (1) and (3) above do not apply if the accessory apartment is occupied by an elderly person who has been a continuous tenant of the accessory apartment for at least 20 years.

Conclusion: Not applicable

**59-G § 2.00(c) Land Use Requirements**

(1) The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot width, lot coverage, building height and the standards for an accessory building in the case of conversion of such a building.

Conclusion: The subject lot is approximately 9,834 square feet in size.

(2) An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in excessive concentration of similar uses, including other special exception uses, in the general neighborhood of the proposed use (see also section G-1.21 (a)(7) which concerns excessive concentration of special exceptions in general).

Conclusion: The fact that only one existing accessory apartment has been identified in the broadly defined neighborhood of the subject property supports the conclusion that this special exception, if granted, will not result in an excessive concentration of similar uses in the general neighborhood.

(3) Adequate parking must be provided. There must be a minimum of 2 off-street parking spaces unless the Board makes either of the following findings:

- (i) More spaces are required to supplement on-street parking; or
- (ii) Adequate on-street parking permits fewer off-street spaces.

Off-street parking spaces may be in a driveway but otherwise must not be located in the yard area between the front of the house and the street right-of-way line.

Conclusion: Two off-street parking spaces are available in the driveway, in addition to three spaces in the street in front of the property.

#### **D. Additional Applicable Standards**

In addition to complying with the zoning requirements set forth in Chapter 59-G, an accessory apartment must be approved for habitation by the Department of Housing and Community Affairs. In this case Mr. Martell, testifying for DHCA, found that the proposed accessory apartment will meet all current standards with the seven conditions specified on Exhibit 14 and on pages 8 and 9 above. As noted, Ms. Jeleva agreed, on behalf of the Petitioners, to meet these conditions.

#### **V. RECOMMENDATION**

Based on the foregoing analysis, I recommend that Petition No. S-2600, for a special exception to permit an accessory apartment use in a single-family residential structure located at 14012 Arctic Avenue, Rockville, be GRANTED, with the following conditions:

1. The Petitioner is bound by her testimony and exhibits of record;
2. One window in each bedroom must be enlarged to meet Code standards for emergency egress. This requires a window that can be opened without a tool and has at least five square feet in net clear opening, a minimum net clear opening height of 22 inches, and a minimum net clear opening width of 20 inches, with the bottom of the opening not more than 44 inches above the floor.
3. A partition must be installed in the kitchen to separate the heating, ventilation and cooling ("HVAC") systems from the kitchen area. The return air for the furnace must not be taken from the kitchen. In addition, a grill or vent must be installed in the partition for adequate air intake for the HVAC systems.
4. A kitchen stove must be installed. An electrical work permit must be obtained and finalized.
5. A single-cylinder deadbolt lock (key-operated from the outside, thumb-turn on the inside) must be installed on the apartment entrance door.
6. The concrete retaining wall adjacent to the apartment entrance door must be repaired in a proper and good, workmanlike manner.
7. The walkway leading to the accessory apartment must be repaired in a proper and good, workmanlike manner to be certain it is in good, safe, serviceable condition and prevents any tripping hazard.
8. The rear and side yard must be properly landscaped to prevent erosion and washout. An effective ground cover (sod) must be installed.
9. The accessory apartment may be inhabited by no more than two unrelated persons or a family of six persons.

Dated: May 24, 2004

Respectfully submitted,

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Françoise M. Carrier  
Hearing Examiner

